

Professional Services Contract Clause Project Specific Contracts - With DBE Goal

Federal-aid Contracts Only

A. Nondiscrimination

1. During the performance of this Contract, the Consultant, for itself, its Subconsultants, assignees and successors shall:
 - a. Not discriminate on the basis of race, color, national origin, or sex and shall carry out applicable requirements of 49 CFR Part 26 in the performance of this Contract. Failure by the Consultant to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract, disqualification from proposing on other Contracts or other remedy as the State deems appropriate.
 - b. Comply with Executive Order 2009-09, "Prohibition of Discrimination in Employment by Government Contractors and Subcontractors," which is hereby included in its entirety by reference and considered a part of this Contract.
 - c. Comply with the provisions of Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor Regulations (41 CFR Part 60). Said provisions are made applicable by reference and are hereinafter considered a part of this Contract.
 - d. Post in conspicuous places available to employees and applicants for employment, the following notice:

"It is the policy of this company not to discriminate against any employee, or applicant for employment, because of race, color, religion, creed, national origin, sex, age, handicapped, or disabled veterans and Vietnam era veterans. Such actions shall include, but are not limited to: employment, upgrading, demotion, transfer, recruitment, or recruitment advertising; laying-off or termination; rates of pay or other compensation; and selection for training, and on-the-job training. Also, it is the policy to ensure and maintain a working environment free of harassment, intimidation and coercion."
 - e. Comply with the Regulations relative to nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation (hereinafter USDOT), 49 CFR Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this Contract.
 - f. Not discriminate on the grounds of race, color, sex, or national origin in the selection and retention of Subconsultants, including procurement of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices.
 - g. In all solicitations either by competitive bidding or negotiations made by the Consultant for work to be performed under a subcontract, including procurement of materials or leases of equipment, notify each potential Subconsultant or supplier of the Consultant's obligations under this Contract and the Regulations relative to nondiscrimination on the ground of race, color, or national origin.
 - h. Provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the State to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant

shall so certify to the State as appropriate, and shall set forth what efforts it has made to obtain the information.

2. In the event of the Consultant's noncompliance with the NONDISCRIMINATION provision (Section A) of this Contract, the State shall impose such Contract sanctions as the State or FHWA may determine to be appropriate, including but not limited to:
 - a. Withholding of payments to the Consultant under the Contract until the Consultant complies, and/or;
 - b. Cancellation, termination, or suspension of the Contract, in whole or in part.
3. The Consultant shall include the provisions of paragraph 1.a. through 1.h. in every subcontract with Subconsultants, DBEs and non-DBEs, including procurement of materials and equipment leases, unless exempt by the Regulations or directives issued pursuant thereto.
4. The Consultant shall take such action with respect to any Subconsultants or procurement as the State or the Federal Aviation Administration (FAA), FHWA and the Federal Transit Administration (FTA) may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event the Consultant becomes involved in or is threatened with litigation with a Subconsultant or supplier as a result of such direction, the Consultant may request the State to enter into such litigation to protect the interests of the State, and in addition, the Consultant may request the United States to enter into such litigation to protect the interests of the United States.

B. Affirmative Action

The Consultant shall take the following affirmative action steps with respect to securing supplies, equipment or services under the terms of this Contract.

1. Include qualified firms owned by socially and economically disadvantaged individuals on solicitation lists.
2. Assure that firms owned by socially and economically disadvantaged individuals are solicited whenever they are potential sources.
3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum participation by firms owned by socially and economically disadvantaged individuals.
4. Where the requirement permits, establish delivery schedules which shall encourage participation by firms owned by socially and economically disadvantaged individuals.
5. Use the services and assistance of ADOT DBE Supportive Services Program, the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as needed.

C. Participation by Disadvantaged Business Enterprises – Commitment, Compliance and Reporting

1. The Department has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. ADOT has received federal financial assistance from the USDOT and as a condition of receiving this assistance, ADOT has signed an assurance that it shall comply with 49 CFR Part 26.

It is ADOT's policy to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in federally-funded contracts. It is also ADOT's policy to:

- a. Ensure nondiscrimination in the award and administration of federally-funded contracts;
- b. Create a level playing field on which DBEs can compete fairly for federally-funded contracts;

- c. Ensure that the DBE program is narrowly tailored in accordance with applicable law;
- d. Ensure that only firms that fully meet 49 CFR Part 26 eligibility requirements are counted as DBEs;
- e. Help remove barriers to the participation of DBEs in federally-funded contracts;
- f. Assist in the development of firms that can compete successfully in the marketplace; and
- g. Facilitate and encourage participation by Small Business Concerns (SBCs) in ADOT contracts. ADOT encourages Consultants to take reasonable steps to eliminate obstacles to SBC's participation and to utilize SBCs in performing contracts. See Section E.

The Federal regulations require a recipient of federal highway funding to implement an approved DBE Program that consists of establishing a statewide DBE utilization goal that uses race-neutral means to the maximum feasible extent to achieve the goal. Where race-neutral measures prove inadequate to achieve the goal, the State is required to use race-conscious measures, such as a DBE participation goal for individual contracts.

The Department has established an overall annual goal for DBE participation on Federal-aid contracts. The Department intends to meet the goal with a combination of race-conscious efforts and race-neutral efforts. Race-conscious participation occurs where the Consultant uses a percentage of DBEs to meet a contract specified goal. Race-neutral efforts are those that are, or can be, used to assist all small businesses or increase opportunities for all small businesses.

The Consultant is required to adhere to the commitment made to utilize certified Disadvantaged Business Enterprises (DBE) as indicated in the firm's Statement of Qualifications (SOQ) or subsequently agreed to by the State during negotiations. The State, at its discretion on a case-by-case basis, may waive the above limitations.

2. **DBE GOAL/COMMITMENT AND DOCUMENTATION:**

- a. A DBE GOAL OF ____% HAS BEEN ESTABLISHED ON THIS CONTRACT. THE CONSULTANT IS ENCOURAGED TO OBTAIN DBE PARTICIPATION ABOVE AND BEYOND THE GOAL ON THIS PROJECT.
- b. The Consultant is required to adhere to the goal/commitment made to utilize certified DBEs as indicated in the firm's Statement of Qualifications (SOQs) or the Consultant and Subconsultant DBE Affidavits submitted or subsequently agreed to by the State during negotiations.
- c. The Consultant is also required to utilize DBEs at or above the DBE goal established in this Contract if Contract Modifications increase the value of the Contract. If ADOT determines that the Consultant has not met the DBE goal or has not made an adequate good faith effort to meet the DBE goal as Contract Modifications increase the value of the contract, ADOT reserves the right to disapprove the Contract Modification negotiations with the firm. If the Consultant wishes to dispute the Good Faith Effort determination, the Consultant may escalate the decision according to the levels outlined in **Section __ (DISPUTE ESCALATION) of this Contract.** The ADOT Business Engagement Compliance Office (BECO) will be represented at each escalation level with the goal of resolving the matter at the lowest possible level. **The decision of the BECO is final.**

3. **COMPLIANCE:**

- a. This Contract is subject to DBE compliance tracking for the Consultant and its Subconsultants. Lower-tier Subconsultants and Vendors are required to provide any requested DBE Contract compliance-related data in hard copy or electronically as determined by the State, including written agreements between the Consultant and Subconsultant DBEs. The Consultant shall report the amount earned by

and paid to each DBE and non-DBE Subconsultants working on the project for the preceding month on each monthly Progress Payment Report. The Consultant is responsible for ensuring that the Consultant and all its Subconsultants and lower-tier Subconsultants have completed all requested items and that their contact information is accurate and up-to-date.

- b. The Consultant's achievement of the DBE goal is measured by actual payments made to the DBEs. At the completion of the project, the Consultant shall complete and submit a *Certification of Payments to DBE Firms* affidavit for each DBE firm working on the project. This affidavit shall be signed by the Consultant and the relevant DBE Subconsultant and submitted to **LPA/Subrecipient or Procurement** and BECO.

4. **REPORTING AND SANCTIONS:**

- a. ADOT is required to collect DBE participation data on all Federal-aid projects, whether or not there is a stated DBE goal/commitment on this Contract. Therefore, the Consultant shall report the monthly payments made to all DBE, non-DBE Subconsultants and Direct Expense Vendors, including all lower-tier Subconsultants, for labor, equipment, and materials. If the Consultant and its Subconsultants do not provide all required DBE usage and payment information with the monthly Progress Payment Reports (PPRs) submittals for the preceding month, and complete its monthly audit and reporting of payments to DBEs and non-DBEs in the DBE System, the State shall deduct \$1,000 for each delinquent report, whether from the Consultant or any of its Subconsultants, from the progress payment for the current month, not as a penalty but as liquidated damages. If by the following month, the required DBE payment information for the previous month has still not been provided, the State shall deduct an additional \$1,000 for each delinquent report. Such deductions shall continue for each subsequent month that the Consultant or its Subconsultants fail to provide the required payment information.
- b. The Consultant, Subconsultants, lower-tiered Subconsultants and Vendors shall confirm the payments received from ADOT and/or the Consultant through ADOT DBE Contract & Labor Compliance Management System (**DBE System**).
- c. After execution of this Contract and before the first Payment Report/Invoice is submitted to ECS, the Consultant is required to log into the DBE System and enter the name, contact information, and subcontract amounts for all Subconsultants, lower-tier Subconsultants and Direct Expense vendors performing any work on the project to help ADOT track and monitor payments to DBE and non-DBE Subconsultants on the project and to confirm that the scope of services and commitments made via the DBE Intended Participation Affidavits are being met.
- d. All DBE and non-DBE subcontracting activities and payments shall be reported by the Consultant. All DBE subcontracting activities will be counted toward DBE participation. This includes lower-tiers subcontracting activities regardless of whether or not the DBE is under contract with another DBE.
- e. At the completion of this Contract, the Consultant shall submit a Certification of Payments to DBE Firms affidavit certifying that all DBEs were paid in full for material and/or work promised and performed under the terms of this Contract.

5. **DBE SUBSTITUTION OR REPLACEMENT:**

- a. The Consultant shall not terminate a DBE Subconsultant listed in the SOQ or in the Consultant or Subconsultant DBE Affidavit submitted during cost negotiations without the prior written approval by the State.
- b. If a Subconsultant is terminated, or fails to complete its work on this Contract for any reason, the Consultant shall make a good faith effort to find another DBE to perform at the least the same amount

of work under the Contract as the DBE that was terminated, to the extent needed to meet the DBE commitment percentage established in this Contract.

6. **CONTRACT TERMINATION:**

The Department, at its sole discretion, may terminate the Contract at any time if the Department determines that the Consultant is not satisfactorily meeting the DBE goal/commitment stated in the Contract or is not making satisfactory good faith efforts to meet the goal.

D. Counting DBE Participation

In counting the DBE participation, the Department shall apply the rules in 49 CFR §26.55 (**APPENDIX _**) as a supplement herein. The firm shall count only the value of the work actually performed by the DBE toward DBE goals. No credit shall be allowed for shipping, manufacturing or supply.

1. Contracts created to artificially create DBE participation are not acceptable; the arrangement shall be within normal industry practices. The DBE shall perform a commercially useful function.
2. Count the entire amount of that portion of a Contract (or other Contract not covered by paragraph (2) of this section) that is performed by the DBE's own forces. Firms shall include the cost of supplies and materials obtained by the DBE for the work on the Contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE Subconsultant purchases or leases from the Consultant or its affiliate).
3. Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specially required for the performance of a DOT-assisted contract, toward DBE goals, provided the fee is determined to be reasonable and not excessive as compared with the fees customarily allowed for similar services.
4. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the lower-tier Subconsultant is itself a DBE. Work that a DBE subcontracts to a non-DBE does not count toward DBE goals.
5. It is presumed that the DBE is not performing a **commercially useful function** if: (a) a DBE does not perform or exercise responsibility for **at least 30 percent (30%)** of the total cost of its Contract with its own work force; or (b) the DBE subcontracts a greater portion of the work of a Contract than would be expected on the basis of normal industry practice for the type of work involved.

E. Participation by Small Business Concerns (SBCs)

It is ADOT's policy to facilitate and encourage participation by Small Business Concerns (SBCs) in ADOT contracts. ADOT encourages Consultants to take reasonable steps to eliminate obstacles to SBC's participation and to utilize SBCs in performing contracts.

Consultant shall take all reasonable steps to remove obstacles to SBC participation in the contract. ADOT encourages the Consultant to utilize SBCs. SBCs are registered in the Arizona Unified Transportation Registration and Certification System (AZ UTRACS).

APPENDIX _

TITLE 49 - TRANSPORTATION
Subtitle A – Office of the Secretary of Transportation

PART 26 PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF
TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

[Code of Federal Regulations]; [Title 49, Volume 1]; [Revised as of October 1, 2008]
From the U.S. Government Printing Office via GPO Access; [CITE: 49CFR26.55]; [Page 300-302]

Subpart C Goals, Good Faith Efforts, and Counting

§26.55 - How is DBE participation counted toward goals?

- (a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.
 - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - (2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
 - (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE shall also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you shall evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
 - (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you shall examine similar transactions, particularly those in which DBEs do not participate.
 - (3) If a DBE does not perform or exercise responsibility for **at least 30 percent** of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.
 - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that

the firm is performing a commercially useful function given the type of work involved and normal industry practices.

- (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
 - (1) The DBE shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE shall itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - (5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it shall obtain written consent from the appropriate Department Operating Administration.

Example to this paragraph (d)(5): DBE Firm X uses two (2) of its own trucks on a contract. It leases two (2) trucks from DBE Firm Y and six (6) trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four (4) of the six (6) trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight (8) trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

- (6) For purposes of this paragraph (d), a lease shall indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks shall display the name and identification number of the DBE.
- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
 - (1) (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 - (2) (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
 - (A) To be a regular dealer, the firm shall be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
 - (B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution

equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

- (C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).
- (3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in Sec. 26.87(i).
- (g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.
- (h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

APPENDIX A TO 49 CFR PART 26

GUIDANCE CONCERNING GOOD FAITH EFFORTS

NOTE: In the following section of the Federal requirements the “you” means the agency (ADOT).

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.
- II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.
- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.
- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.
 - A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
 - B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone

numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

- (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
- F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

Note: Contacting the Business Engagement and Compliance Office for assistance in identifying certified DBEs that can perform work on a contract or task order is also considered a strong factor in making good faith efforts.